STATE OF MICHIGAN

COURT OF APPEALS

JAMES D. MCCORNACK and KAREN M. MCCORNACK,	UNPUBLISHED June 17, 2003
Plaintiffs-Appellants,	
v	No. 238726 Oakland Circuit Court
LISA DARLING,	LC No. 99-014227-NI
Defendant-Appellee.	

Before: Owens, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment of no cause of action entered following a jury verdict finding that defendant was not negligent in this automobile negligence case. We affirm.

I.

Plaintiffs first argue that the trial court erred in denying their motion for directed verdict on the issue of liability and in instructing the jury on the use of the sudden emergency doctrine as an excuse for defendant's statutory violations. The trial court's decision on a motion for a directed verdict is reviewed de novo. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779 (2002). This Court reviews all the evidence presented up to the time of the motion in the light most favorable to the nonmoving party and grants her very reasonable inference and resolves any conflict in the evidence in her favor to determine whether a question of fact existed. *Id*. at 702. "A directed verdict is appropriate only when no factual question exists on which reasonable jurors could differ." *Id.*

A.

The trial court properly denied plaintiffs' motion for directed verdict because there was sufficient evidence presented to raise a question of fact which, if believed, would relieve defendant from liability, regardless of whether the trial court considered the sudden emergency doctrine as an excuse for defendant's statutory violations. Even in cases where a defendant has not provided sufficient evidence to request a jury instruction on sudden emergency, "the jury [is] required to consider the weather conditions in deciding the question of negligence." *Jackson v Coeling*, 133 Mich App 394, 401; 349 NW2d 517 (1984) (instruction on sudden emergency not

available for violation of assured distance statute because the statute specifically requires drivers to take into account the surface of the highway and "any other condition then existing," MCL 257.627(1)). Here, there was testimony that it was drizzling throughout the day and plaintiffs testified that it had begun to snow after they returned home, and continued to snow heavily when they later left their house. Porter Road was covered with snow and slippery because of the ongoing snowstorm. Defendant was driving down Porter at or under twenty miles per hour because the "roads were terrible." As defendant's car was fifteen to twenty feet from plaintiffs' car, it suddenly turned at a forty-five degree angle and shot across Porter into plaintiffs' car. Defendant testified that "[a]s [plaintiffs] approached closer, something made [her] slide and [her car] went in towards them." Therefore, even if plaintiffs established a prima facie presumption of statutory negligence to which the sudden emergency instruction was not available, there would remain a question of fact on the issue of defendant's negligence under the facts of this case. *Derbabian, supra*.

B.

Plaintiffs next argue that the trial court improperly instructed the jury on the sudden emergency doctrine, or M Civ JI 12.02, entitled "excused violation of statute." When requested by a party, a standard jury instruction must be given if it is applicable and accurately states the law. MCR 2.516(D)(2). A requested instruction need not be given if it would neither add to an otherwise balanced and fair jury charge nor enhance the jury's ability to decide the case intelligently, fairly and impartially. *Johnson v Corbet*, 423 Mich 304, 327; 377 NW2d 713 (1985).

The trial court properly determined that the sudden emergency doctrine was applicable, and properly instructed the jury pursuant to M Civ JI 12.02. Our Court has held "that the sudden emergency jury instruction is appropriate where a party is confronted with a situation that is 'unusual,' meaning varying from the everyday traffic routine confronting a motorist, or 'unsuspected,' meaning appearing so suddenly that the normal expectations of due and ordinary care are modified." *Young v Flood*, 182 Mich App 538, 542; 452 NW2d 869 (1990). This Court's opinion in *Young* is on point, and therefore, controlling. In *Young*, the plaintiff likewise argued "that the trial court erred in instructing the jury on the use of the sudden emergency doctrine as an excuse for defendant's violating the state statutes requiring her to drive on the right side of the road." *Id*. at 540. The plaintiff was involved in an automobile accident in which the vehicle driven by the defendant skidded on ice, crossed the center line, and collided with the plaintiff's pickup truck. *Id*. at 539-540. The defendant testified that she "recognized that the roads were slippery and snow-covered, and [that she] was traveling about thirty miles per hour when she hit an icy patch and lost control of the car." *Id*. at 540. The plaintiff also testified that it was "snowing and that the road surface was icy and that he was driving at approximately twenty-five miles per hour when he saw [the] defendant's car cross the center line." *Id*. The plaintiff then "braked and veered to the right, unsuccessfully attempting to avoid the accident." *Id*.

This Court in *Young* noted that "[a]n instruction of sudden emergency is to be given whenever there is evidence which would allow a jury to conclude that an emergency existed within the meaning of that doctrine." *Id.* at 544, citing *Dennis v Jakeway*, 53 Mich App 68, 74, 218 NW2d 389 (1974). For example, "a driver who is driving at a prudent speed for icy conditions and suddenly hits a patch of ice causing the car to skid across the center line may be

excused" under the sudden emergency doctrine. *Id.* at 543. The Court then held that, "[h]ere the evidence that [the] defendant, while recognizing that the highway was icy, hit a patch of ice that caused a skid was sufficient evidence of a sudden emergency that has been recognized by Michigan courts as an excuse for violation of the statutes requiring drivers to keep to the right." *Id*. at 544. Thus, the *Young* Court concluded that the sudden emergency instruction was justified. *Id*.

The facts in *Young* are analogous to the facts in the instant case. Here, defendant testified, "as [plaintiffs] approached closer, something made [her] slide and [her car] went in towards [plaintiffs]." Based on the weather conditions that day and the evidence that defendant's speed was not unreasonable or that she was on the wrong side of the road intentionally, it was permissible to infer that defendant lost control and skidded due to a patch of ice on the roadway. Thus, even though defendant recognized that Porter was slippery and snow-covered, there was "sufficient evidence of a sudden emergency that has been recognized by Michigan courts as an excuse for violation of the statutes requiring drivers to keep to the right." *Id.* We have previously recognized that "a blizzard or other extreme weather conditions may cause such an unusual driving environment that the normal expectations of due and ordinary care are modified by the attenuating factual conditions." *Vsetula v Whitmyer*, 187 Mich App 675, 681; 468 NW2d 53 (1991). Because there was sufficient evidence of a sudden emergency to excuse violations of the statutes requiring drivers to keep to the right, the trial court properly instructed the jury on the applicable law. MCR 2.516(D)(2). Indeed, a review of the evidence in this case convinces this Court that even without the sudden emergency doctrine, the jury could have legitimately concluded that defendant acted as a reasonable and prudent person under the circumstances. Therefore, we find no error requiring reversal and plaintiffs' arguments fail.

II.

Plaintiffs next argue that the trial court erred in denying their motion for judgment notwithstanding the verdict (JNOV) or new trial because it improperly instructed the jury on the sudden emergency doctrine, the verdict was against the great weight of evidence, and the trial court improperly gave the jury further instruction on the issue of negligence outside the presence of plaintiffs' counsel. We disagree. Decisions on motions for JNOV are reviewed de novo. *Graves v Warner Bros*, 253 Mich App 486, 491; 656 NW2d 195 (2002). We review a trial court's decision whether to grant a new trial for an abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). An abuse of discretion occurs when the decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34-35; 609 NW2d 567 (2000).

A.

Plaintiffs argue that the trial court erred in denying their motion for JNOV or new trial because it improperly instructed the jury on the sudden emergency doctrine. "An instruction of sudden emergency is to be given whenever there is evidence which would allow a jury to conclude that an emergency existed within the meaning of that doctrine." *Young, supra*. As previously discussed, there was evidence of bad road conditions presented, which allows a jury to conclude that an emergency existed. Therefore, the trial court properly denied plaintiffs' motion for JNOV or new trial as to this issue.

B.

Plaintiffs also argue that the trial court erred in denying their motion for JNOV or new trial because the verdict was against the great weight of evidence. We disagree. "This Court gives substantial deference to the conclusion of a trial court that a verdict was not against the great weight of the evidence." *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995). Moreover, an appellate court "may overturn a jury verdict 'only when it was manifestly against the clear weight of the evidence.'" *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999), quoting *Watkins v Manchester*, 220 Mich App 337, 340; 559 NW2d 81 (1996). Further, the jury's verdict should not be set aside if there is competent evidence to support it. *Id.*

Plaintiffs specifically maintain that defendant's violation of four statutes constituted a prima facie case of negligence to which defendant did not have a legally sufficient excuse to avoid liability. Violation of a statute creates a rebuttable presumption of negligence. *Dep't of Transportation v Christensen*, 229 Mich App 417, 420; 581 NW2d 807 (1998). "[S]uch a presumption of negligence may be rebutted with a showing of an adequate excuse or justification under the circumstances." *Id*.

The jury's verdict was not manifestly against the clear weight of the evidence. Even though defendant recognized that Porter was slippery and snow-covered, there was "sufficient evidence of a sudden emergency that has been recognized by Michigan courts as an excuse for violation of the statutes requiring drivers to keep to the right." *Young, supra*. Defendant testified that it drizzled all day. Both parties testified that it was snowing heavily prior to and at the time of the accident. Defendant's car was fifteen to twenty feet from plaintiffs' car and suddenly turned at a forty-five degree angle and shot across Porter into plaintiffs' car. Defendant testified that she was driving at or under twenty miles per hour and "as [plaintiffs] approached closer, something made [her car] slide and it went in towards them." Thus, there was clear evidence of bad road conditions caused by the weather, such that the jury could reasonably infer that defendant was confronted with an unusual situation appearing so suddenly that the normal expectations of due and ordinary care are modified. *Young, supra* at 542. This is a legally sufficient excuse to refute the inference of defendant's negligence. *Id.* Further, both parties testified that defendant was driving slowly, five miles per hour slower than plaintiffs. Other than the sudden slide into plaintiffs' car, plaintiffs presented no other evidence of negligence on defendant's part. Therefore, the trial court properly denied plaintiffs' motion for JNOV or new trial on this basis.

C.

Plaintiffs' final argument is that the trial court erred in denying plaintiffs' motion for JNOV or new trial because the trial court improperly gave the jury further instruction on the issue of negligence outside the presence of plaintiffs' counsel. Trial courts are prohibited from engaging in ex-parte communication with a deliberating jury. *People v France*, 436 Mich 138, 161; 461 NW2d 621 (1990).[1] However, not all *ex-parte* communication requires reversal.

[1] In *France*, the Supreme Court specifically held that this rule is equally applicable in civil cases. *France, supra* at 142 n 3.

Reversal is warranted only if the improper communication resulted in undue prejudice. *Id.* at 143.

Here, plaintiffs allege that after the verdict, the jury foreperson, in the presence of three other jurors, informed plaintiffs' counsel that the jury had submitted a question to the trial court that requested clarification on the issue of negligence. The trial court allegedly then sent an instruction into the jury room. However, the four jurors could not inform plaintiffs' counsel of the content of the trial court's response. Plaintiffs' counsel maintains that he was not aware that the jury sent a question to the trial court. Also, one juror, who may or may not have been one of the jurors that plaintiffs' counsel spoke with, called plaintiffs' counsel's office and spoke with the law clerk. The juror told the law clerk that the jury had submitted a question to the trial court that requested clarification on the issue of negligence and that the trial court sent an instruction into the jury room. Again, the juror did not specifically remember the content of the trial court's answer, but indicated that the trial court's response concerned the issue of negligence.

"The linchpin of [whether an ex parte communication with the jury will result in reversal] centers on a showing of prejudice . . . ." *Id.* at 162. In assessing the prejudicial effect of an ex parte communication, a trial court's communication must be categorized into one of three categories: substantive, administrative, or housekeeping. *Id.* at 163. "Substantive communication encompasses supplemental instruction on the law given by the trial court to a deliberating jury." *Id.* "A substantive communication carries a presumption of prejudice in favor of the aggrieved party regardless of whether an objection is raised." *Id.*

Here, there is insufficient evidence of prejudice resulting from the alleged improper ex-parte communication to require a new trial. Only "[a] substantive communication carries a presumption of prejudice in favor of the aggrieved party." *Id.* Here, there is insufficient evidence to categorize the trial court's alleged communication as substantive. Even assuming that the affidavits provided by plaintiffs' counsel are true, there is no evidence of the content of the trial court's alleged instruction to the jury. While the trial court may have given supplemental instruction on the issue of negligence to the deliberating jury, it is just as likely that the trial court merely repeated a standard jury instruction on the request of the jury to which plaintiffs' counsel expressed satisfaction.[2] *VanBelkum v Ford*, 183 Mich App 272, 274; 454 NW2d 119 (1989). "Such practice is common and within the trial court's discretion." *Id.*; see also MCR 2.516(B)(4). Given plaintiffs' failure to prove that the alleged communication was substantive, prejudice is not presumed and must be established. *France, supra* at 163. Here, plaintiffs have "not explained how [they were] prejudiced by the court's [alleged] answer to the jury's [alleged] question and we see no prejudice resulting from the trial court's [alleged] answer to the jury's [alleged] question." *Meyer v Center Line*, 242 Mich App 560, 566; 619 NW2d 182 (2000). Therefore, the trial court did not abuse its discretion in denying plaintiffs' motion for new trial.

---

[2] Plaintiffs' counsel objected only to the jury instruction on the excused violation of a statute, M Civ JI 12.02. However, the jury was given several instructions regarding the issue of negligence besides M Civ JI 12.02 to which plaintiffs' counsel expressed satisfaction.

Affirmed.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Christopher M. Murray